

ESTATE OF PHILLIP TOOISGAH

IBIA 75-51

Decided November 13, 1975

Appeal from an administrative law judge's order denying petition for rehearing and from order modifying decision.

Affirmed in part; vacated in part; and remanded.

1. Indian Probate: Marriage: Proof of Marriage

As between two alleged common-law marriages, the law favors the most recent in time over a relationship between two who formerly were married.

2. Indian Probate: Trust Property: Generally

Judgments entered against allottees of restricted land are voidable.

3. Indian Probate: Trust Property: Generally

Despite strict laws prohibiting the alienation and encumbrance of restricted land, the Secretary has authority to approve an agreement made by an allottee for the disposition of oil income from restricted property.

APPEARANCES: Houston Bus Hill for appellants; Red Ivy for appellee.

OPINION BY ADMINISTRATIVE JUDGE HORTON

A petition for rehearing in the Estate of Phillip Tooisgah, Ft. Sill Apache and Apache Unallottee, brought by Velma Tooisgah, alleged spouse of the decedent, and Jonathan Tooisgah, decedent's son, was denied by order of the Administrative Law Judge, John F. Curran, on January 3, 1975. On the same date, Judge Curran entered an order modifying his July 19, 1974, decision by disallowing Velma Tooisgah any distribution rights in the estate of the decedent. An appeal of these orders was timely filed on March 21, 1975. The issues have been briefed by the parties and the extensive record on appeal has been carefully reviewed by the Board. For the reasons set forth in this opinion, Judge Curran's order denying appellants a rehearing in this matter shall be affirmed as to the

determination of the decedent's legal widow; the order granting the appellee, Clara Walker Tooisgah, her requested relief from a petition for rehearing is vacated and the cause remanded.

The Administrative Law Judge entered a Memorandum Decision and Order Determining Heirs on July 19, 1974, as modified January 3, 1975, in which Clara Walker Tooisgah, a/k/a Clara Walker, was adjudged the surviving wife of the decedent and, according to Oklahoma law, entitled to a one-half interest in the probated estate; the other one-half to be inherited by Jonathan Tooisgah, the decedent's only son. The evidence which led to this determination was adduced from an original and two supplemental hearings and from testimony incorporated from probate proceedings conducted in state court. 1/

Specific determinations dispositive of this appeal include the following: that Phillip Tooisgah, who died intestate on February 10, 1971, was survived by a common-law wife named Clara Walker Tooisgah, appellee, 2/ in addition to one son, Jonathan Tooisgah, appellant; that Velma Tooisgah, appellant, was formerly

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1/ The district court judge of Caddo County, Oklahoma, determined that Clara Walker Tooisgah was the surviving widow of the decedent in a finding made May 29, 1974.

2/ The record shows Phillip and Clara were married in a civil ceremony as early as 1940 or 1941 but that this marriage was annulled the same year.

married to Phillip Tooisgah, first by common-law and then by civil ceremony on September 23, 1940, but that this marriage was terminated by a valid divorce obtained in state court on September 19, 1969; that irrespective of evidence that Phillip and Velma cohabited together subsequent to their divorce, neither a common-law marriage nor a reinstatement of their first marriage occurred; that irrespective of evidence that Phillip and Clara cohabited together and otherwise projected themselves as husband and wife within six months from the date of the decedent's divorce from Velma, their common-law relationship continued after such period and until Phillip's death in 1971, thereby satisfying legal requirements to support a common-law marriage; 3/ that Clara Walker Tooisgah was not the common-law wife of Jess Copley at the time of her relationship with the decedent and therefore possessed full capacity to marry.

Without the benefit of personal observation of the more than 20 witnesses who testified in this matter, a factor which influenced the Administrative Law Judge in favor of the appellee

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3/ Appellants contend the Administrative Law Judge erred "in his conclusion that Phillip had the legal capacity to enter into a common-law marriage during the six-month period after the divorce" (Item 8, Appellants' Grounds for Appeal and Brief in Support of Appeal, p. 10). The Administrative Law Judge did not so rule. To the contrary, Judge Curran's opinion states at page 3:

"Title 12, Section 1280, Oklahoma Statutes, 1971, provides that it shall be unlawful for a party to a divorce action to marry another person within a period of six months from the date of the divorce decree. Thus, the entry into the common-law relationship immediately after the divorce was unlawful."

(Memorandum Op., p. 3), the transcript of proceedings persuasively conveys that Phillip Tooisgah and Clara Walker established a valid common-law marriage which remained in effect until Phillip's death. The evidence shows, inter alia, that Phillip gave Clara an engagement and wedding ring following his divorce from Velma (Tr. 27, 63). The decedent opened a charge account for Clara as his wife (Tr. 114). Phillip and Clara borrowed money from the bank as husband and wife and jointly signed notes of indebtedness (Tr. 36). A motor vehicle title was held in their joint names (Tr. 93). The decedent introduced Clara to people as his wife (Tr. 26, 32, 42). The decedent and Clara traveled extensively together, registering in motels as husband and wife and visiting relatives as husband and wife (Tr. 64, 110). Phillip and Clara lived together from September 1969, until the decedent's death, February 10, 1971 (Tr. 10). Throughout the above period, Phillip and Clara were commonly known to be husband and wife in the community at large (Tr. 31, 36, 42, 50, 114). 4/

In contrast, an unconvincing scenario was presented by the appellants that Velma and Phillip Tooisgah had disavowed the divorce decreed by a state court in 1969 and that they had lived as man and wife until Phillip's death. However, the overwhelming evidence that Clara Walker, not Velma, was publicly seen with Phillip Tooisgah

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4/ In addition, the record shows the Certificate of Death for Phillip Tooisgah identifies Clara as the surviving widow and that it is she who made arrangements for the decedent's funeral.

from September 1969, until February 1971, among the other compelling indicia of a marital relationship between Clara and the decedent previously noted, casts too strong a doubt on the credibility of the appellants' claim that Velma stayed married to Phillip after 1969, or that, in the alternative, Phillip had no wife at the time of his death.

[1] Appellants press a claim that the law favors a finding of a common-law marriage "between persons who were previously married to each other, then were divorced, and then began living together again" (Brief in Support of Appeal, p. 2). An Oklahoma Supreme Court case, Thomas v. James, 69 Okla. 285, 171 P. 855 (1918), relying in part on Clark v. Barney, 24 Okla. 455, 103 P. 598 (1909), is cited in support of this rule. No such finding can be presumed, however, in the face of a more recent common-law marriage and any such evidence necessarily contradicts a former spouse's claim of reconciliation. See Hill v. Shreve, 448 P.2d 848 (1968), where the court discusses the presumption favoring validity of the last marriage, including marriage by common law, and places the burden of showing first marriage validity upon the party asserting same. Further, where validity of the first marriage is established, the Hill decision, which has not been overruled, supports a presumption that such marriage was dissolved by divorce or death and "casts the onus of adducing contrary evidence upon the party attacking the last marriage" 448 P.2d at 851. Hill v. Shreve, *supra*, also

observes that the "rigorousness of the court's early decision in Clark v. Barney, *supra* (denying existence of a common-law relationship commenced when one of the parties deserted a living spouse) "has since been mollified by later decisions in more modern and changed times," at 850. See also, Marcum v. Zaring, 406 P.2d 970 (1965), McVey v. Chester, 288 P.2d 740 (1955); Scott v. Scott, 203 Okla. 60, 218 P.2d 373 (1950); Templeton v. Jones, 127 Okla. 1, 259 P. 543 (1927).

Another challenge made to the determination that Clara Walker is the surviving widow of the decedent stems from a claim that Clara assumed a common-law marriage with a man named Jess Copley, now deceased, beginning in the 1950's, and that she therefore lacked capacity to become married to Phillip Tooisgah (Brief in Support of Appeal, p. 11).

Conflicting testimony was introduced on the above point, appellants placing great weight on evidence that the appellee once went by the name of Clara Walker Copley. <sup>5/</sup> On the basis of the legal authority already cited, if a common-law marriage was established between Jess Copley and Clara Walker in the 1950's, which neither the Administrative Law Judge nor this Board perceives from

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<sup>5/</sup> The record does not show that Clara used the name Copley after 1969.

the evidence presented, 6/ the party asserting the validity of this "first marriage" must also overcome the presumption that such marriage was dissolved by divorce or death. The appellants failed to successfully rebut this latter presumption by disproving divorce.

Appellants further contend that a common-law marriage could not have been consummated by the decedent with Clara because of an insufficient showing of "exclusiveness of cohabitation" (Brief in Support of Appeal, p. 13). Borrowing out of context from Clara's testimony, the appellants' brief portrays that Clara admitted to meretricious practices of the decedent during the course of their relationship. In its entirety, however, the record discloses that Phillip and Clara were constant companions as husband and wife following the decedent's divorce from Velma, but for an occasional no show on Phillip's part attributable to drinking (Tr. 84).

#### Review of Order Modifying Decision

On January 3, 1975, the Administrative Law Judge entered an order modifying his decision of July 19, 1974, regarding the

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6/ Appellants object to the Administrative Law Judge's ruling which allowed into evidence a purported affidavit from Jess Copley stating that Clara Walker was never his wife. Regardless of the admissibility factor that the declarant was not available for the hearing, it does not appear that Judge Curran relied, or needed to rely, on the purported Copley affidavit in reaching his decision that Clara possessed legal capacity to marry Phillip Tooisgah.



provision of the 1969 divorce decree between Velma and Phillip Tooisgah which awarded Velma for the term of her natural life one-sixth of the gross income received from oil and gas production from lands held in trust for Phillip by the United States. The Administrative Law Judge's July 19, 1974, order authorized the continued payment of proceeds to Velma from the mineral interests in question in accordance with the state divorce decree. In response to a petition for rehearing submitted in behalf of Clara Walker Tooisgah concerning this determination, the Administrative Law Judge on January 3, 1975, reversed his prior order of July 19, 1974, by striking Velma's name as a distributee. This was done on the basis that the decree of divorce was not enforceable against trust property of the decedent. <sup>7/</sup> Appellants object to the revised ruling as part of their appeal.

[2] Judgments entered against allottees of restricted land are voidable, as recognized by the Supreme Court in the landmark Oklahoma case, Mullen v. Simmons, 234 U.S. 192 (1914). Here, however, the appellants contend that the Secretary of the Interior consented to the payment of funds derived from trust property pursuant to a

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<sup>7/</sup> As to the scope of the term "restricted" or "trust" property, it has been held that an Indian's assignment of proceeds from a mineral lease of restricted land is void as constituting an assignment of part of his inalienable reversion. United States v. Moore, 284 F. 86 (8th Cir. 1922).

divorce settlement and that federal law provides the Secretary, or his duly authorized representative, with authority to so act.

As it stands, there is insufficient evidence in the record to permit a determination as to whether approval was given by an authorized representative of the Secretary to action taken in the divorce decree affecting trust property of the United States. The fact that periodic payments from oil and gas production were made by Phillip to Velma until his death in 1971 is a basis for speculating that such payments might have taken place.

[3] Despite the strict terms of the General Allotment Act of February 8, 1887 (24 Stat. 388), as amended, 25 U.S.C. § 354 (1970), 8/ it is recognized that the Secretary of the Interior has authority to approve an agreement made by an allottee for the disposition of oil income from restricted lands. Udall v. Taunah, 398 F.2d 795 (10th Cir. 1968). See also 25 U.S.C. § 483 (1970), enacted May 14, 1948, which authorizes the Secretary or his representative to approve conveyances of restricted land held by individual Indians under the provisions of the Indian Reorganization

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8/ 25 U.S.C. § 354 reads:

"No lands acquired under the provisions of sections 331-334 of this title shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor."

Act of 1934 (25 U.S.C. § 461 et seq.) and the Oklahoma Indian Welfare Act (25 U.S.C. § 501 et seq.).

In Udall v. Taunah, supra, it was deemed an abdication of the Secretary's responsibility for the Department of the Interior to fail to give any consideration to the merits of a family settlement contract concerning the assignment of all income from restricted lands. The matter was remanded for a hearing to consider the appropriateness of contract approval in recognition of the fact that the Secretary had the authority and opportunity to approve the contract.

On the basis of the authorities referred to, the Board concludes that the January 3, 1975, Order Modifying Decision on Petition of Clara Walker Tooisgah should be vacated and the cause remanded for further proceedings. The task on remand will be to determine whether necessary Secretarial approval was obtained in the payment of oil and gas proceeds to Velma by Phillip pursuant to the terms of their divorce. This requested finding will dictate whether Velma should be reinstated as a distributee in the estate of the decedent. If approval prior to the entry of the divorce decree is not found, the Administrative Law Judge should nevertheless determine whether effective subsequent approval was obtained from an authorized representative of the Secretary, or, in the alternative, if there are compelling grounds for approval

now. 9/ A finding in favor of the appellant on this issue will also require an appropriate revised order on remand concerning attorney fees for Velma Tooisgah's counsel.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing of Jonathan Morris Tooisgah and Velma Tooisgah issued January 3, 1975, by John F. Curran, Administrative Law Judge, be and the same is hereby AFFIRMED as to the determination of the decedent's legal widow. Such decision is final for the Department. IT IS HEREBY FURTHER DECIDED that the Order Modifying Decision on Petition of Clara Walker Tooisgah, issued January 3, 1975, and incorporated by reference in the Order Denying Petition for Rehearing of Jonathan Morris Tooisgah and Velma Tooisgah, above, be and the same is hereby VACATED and the cause REMANDED for further proceedings. ON REMAND, the Administrative Law Judge shall determine if the terms of the 1969 divorce decree between Velma and Phillip Tooisgah are enforceable against trust property of the decedent on account of approval by the Secretary of

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9/ The Tenth Circuit stated in Udall v. Taunah, *supra*, at 797:

\* \* \* "There is no question but that included within the Secretary's authority and control of restricted allotted lands is the power to have approved the contract even though presented to him after the death of the allottee. See Lykins v. McGrath, 184 U.S. 169 [(1902)]." \* \* \*

the Interior, in which case an appropriate order revising the distribution of the decedent's estate shall be entered as well as an Order allowing commensurate attorney fees for Velma Tooisgah's counsel.

Done at Arlington, Virginia.

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Wm. Philip Horton  
Administrative Judge

I concur:

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Alexander H. Wilson  
Administrative Judge